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In The

Supreme Court of the United States

October Term, 1991

SORBOTHANE, INC., BTR, INC.,
HAMILTON-KENT MANUFACTURING COMPANY,
and KENNETH M. LEIGHTON,

Petitioners,

v.

SHIRLEY McQUILLAN and LARRY McQUILLAN,
d/b/a SORBOTURF ENTERPRISES,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JOHN F. BOMSTER*
JOHN A. TARANTINO
W. JAMES McKAY
ADLER POLLOCK & SHEEHAN
INCORPORATED
2300 Hospital Trust Tower
Providence, Rhode Island 02903
(401) 274-7200
Counsel for Petitioners

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

REASONS FOR GRANTING THE WRIT 2

I. Endorsement or Approval of the Unique and Bizarre *Lessig* Rule Is Necessary to Sustain the Result Below 3

II. The Ninth Circuit Decision Squarely Presents the *Copperweld* Issue 5

III. The Failure to Charge on Antitrust Injury in Accordance with *Atlantic Richfield* Is Reversible Error 6

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Atlantic Richfield Co. v. USA Petroleum Co., 110 S. Ct. 1884 (1990) 6

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) 5, 6

E.W. French & Sons, Inc. v. Gen'l Portland, Inc., 885 F.2d 1392 (9th Cir. 1989) 3

Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614 (9th Cir. 1979) 6

Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964) 3, 4, 5

STATUTES AND RULES

Supreme Court Rule 10 2

15 U.S.C. § 1 ..... 5, 8

15 U.S.C. § 2 ..... 4, 5

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Petitioners, Sorbothane, Inc., BTR, Inc., Hamilton-Kent Manufacturing Company, and Kenneth M. Leighton, Sr. (hereinafter collectively referred to as "SI"), have filed a Petition for a Writ of Certiorari ("Petition") which presents three important questions under the federal antitrust laws. Respondents, Shirley McQuillan and Larry McQuillan, individually and d/b/a Sorboturf Enterprises (collectively "McQuillan"), filed their Opposition to Petition for a Writ of Certiorari ("Opposition") on July 26, 1991. SI now files a brief Reply to correct misleading, and

in some instances, materially inaccurate characterizations, references and arguments in the Opposition.

REASONS FOR GRANTING THE WRIT

Before addressing the issue-specific arguments made by McQuillan, a general theme which runs throughout the Opposition should be addressed. Specifically, McQuillan would have the Court believe that it would be a meaningless gesture to consider the antitrust issues raised by SI because reversal would not alter the outcome below. The rationale the Opposition advances is that because SI was also found liable at trial on other claims, a reversal on the antitrust issues raised by SI would leave the balance of the judgment intact.

McQuillan's suggestion is both irrelevant and inaccurate. First, the issues raised by SI are important and timely, and call upon this Court to resolve splits in the Circuit Courts of Appeals as well as to clarify the full reach of leading antitrust opinions of this Court. As such, the questions presented fall four-square within the relevant factors for this Court to consider under Supreme Court Rule 10.

Second, SI challenged on appeal the propriety of the judgment on the other claims as well. However, the Ninth Circuit, rather than address those issues in its decision, affirmed solely on the selected antitrust claims now raised by SI, and expressly stated that "it is not necessary for the Court to address any of those [other] issues." Appendix A to Petition at 31.

A reversal on the antitrust issues before the Court would, at a minimum, require the Ninth Circuit to consider the merits of SI's other points of appeal. Given the seriousness of the issues raised on the claims which the Ninth Circuit disposition avoided,[1] McQuillan should not presume that she would have prevailed on appeal on those claims which the Ninth Circuit expressly declined to reach.

SI now turns to specific points concerning the three questions it has asked this Court to address.

I. ENDORSEMENT OR APPROVAL OF THE UNIQUE AND BIZARRE *LESSIG* RULE IS NECESSARY TO SUSTAIN THE RESULT BELOW.

The first SI issue is the questionable validity of the multiple inferences uniquely allowed in the Ninth Circuit on attempt to monopolize claims under the law established by *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964). As noted in the Petition,

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[1] By way of illustration, the trial court, over objection, charged that the jury could award compensatory damages for unfair competition in violation of Section 17200 of the California Business and Professions Code, when clearly only restitutionary damages are permitted. *E.W. French & Sons, Inc. v. Gen'l Portland, Inc.*, 885 F.2d 1392, 1401-02 (9th Cir. 1989). The trial court also, over objection, allowed a claim of bad faith denial of the existence of a certain contract to go to the jury where McQuillan admitted she had not proved the existence of that contract. Also, the RICO claims were allowed to go to the jury over SI's objection, notwithstanding the absence of, *inter alia*, investment injury and sufficient continuity to demonstrate a pattern of racketeering activity.

the *Lessig* rationale has been universally rejected outside the Ninth Circuit.

Rather than attempt to defend the *Lessig* rationale, McQuillan argues instead that the jury found SI liable for monopolization as well as for an attempt to monopolize. From this alleged fact, McQuillan reasons that the *Lessig* chain of inferences was unnecessary in that the higher standard for actual monopolization was met.

McQuillan is wrong. The special verdict form upon which the jury returned its verdict did not ask the jury to make separate findings on the various Section 2 claims, 15 U.S.C. §2. Rather, a consolidated question was posed to the jury: "Do you find by a preponderance of the evidence that any of the following defendants violated Section 2 of the Sherman Act by monopolizing, attempting to monopolize, and/or conspiring to monopolize the market for Sorbothane products?"[2]

From this question, it is impossible to argue, much less conclude, that the jury's affirmative answer necessarily represents a finding that SI engaged in actual monopolization. To the contrary, one can only conclude that if, as SI argues, the jury were improperly instructed on any element of the issues presented to it (which were encompassed within that portion of the special verdict form), then the answer to that question cannot be sustained on appeal.

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[2] SI proposed that each of substantive offenses alleged under Section 2 be the subject of separate questions to the jury. The trial court declined to use SI's proposed form.

Having insisted on a charge over SI's objection that the jury could find a violation of Section 2 of the Sherman Act under the *Lessig* rule, McQuillan cannot now claim that it was harmless error to so charge the jury. The improper charge infects the special verdict and precludes McQuillan from dodging the *Lessig* bullet.[3]

II. THE NINTH CIRCUIT DECISION SQUARELY PRESENTS THE *COPPERWELD* ISSUE.

The second SI issue is that the horizontal market allocation claim under Section 1 of the Sherman Act, 15 U.S.C. §1, cannot stand where the only entities alleged to have acted in concert were related subsidiaries of a common ultimate parent under this Court's decision in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). The Opposition claims that there was no factual showing of corporate relatedness such as to place the *Copperweld* issue squarely before this Court.

Again, McQuillan's argument is wrong. The argument is factually inaccurate, and it ignores the express language of the Ninth Circuit decision itself assessing the record below. The Ninth Circuit defined its factual predicate in rejecting *Copperweld* as follows: "While the evidence *did show that S.I. and Leyland were licensed by a BTR family member and that they are corporations existing under a family of companies controlled by BTR, PLC*, a U.K.

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[3] SI also notes that, as an errata to the Petition's argument concerning *Lessig*, the sentence on page 10 of the Petition which reads, "Rather, the antitrust laws were designed by Congress to *project* competition" should read " . . . to *protect* competition."

Holding Company, the evidence was to the effect that both corporations operated autonomously." Appendix to Petition at 13 (emphasis added).

The *Copperweld* issue presented by SI is squarely before this Court. It is not dependent upon a reexamination of the factual record. The Ninth Circuit defined the playing field upon which the *Copperweld* issue would be contested, a playing field occupied by two subsidiaries of a common ultimate parent.

The issue presented to this Court is whether concerted activity between these two wholly-owned subsidiaries of a common ultimate parent violates Section 1. The Ninth Circuit accepted the fact of this relationship, but incorrectly engaged in a further examination of the factual niceties of the subsidiaries' operations, relying on pre-*Copperweld* cases such as *Las Vegas Sun, Inc. v. Summa Corp.*, 610 F.2d 614, 617 (9th Cir. 1979). This further factual exploration ignores the clear import of *Copperweld* which ended the *Las Vegas Sun*-type analysis and rested its holding of a lack of a plurality of actors on the fact of corporate relatedness, and nothing more.

III. THE FAILURE TO CHARGE ON ANTITRUST INJURY IN ACCORDANCE WITH *ATLANTIC RICHFIELD* IS REVERSIBLE ERROR.

The third SI issue is that the jury was not properly instructed on the necessity of finding antitrust injury, thereby permitting such injury to be presumed in violation of the clear mandate in *Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S. Ct. 1884 (1990). McQuillan argues that antitrust injury is a question of law, but does not

suggest the issue raised by SI is inappropriate for the issuance of a writ. Rather, McQuillan seeks to avoid review on certiorari by making three diversionary suggestions. None withstand scrutiny.

First, McQuillan claims that SI conceded below that the issue of antitrust injury is a question of law by virtue of certain "issues of law" listed in the Pre-Trial Order. The fact and record is that SI specifically requested that the trial court charge, as an element of the antitrust claims, on the necessity for proving antitrust injury. The Pre-Trial Order, as a jointly-prepared statement of all potential matters for consideration at trial to be used as a road map by the trial court,[4] does not relieve the trial court of its duty to correctly charge the jury on issues of the case ultimately sent to the jury when expressly called upon to do so.

Second, McQuillan claims that the record demonstrates that antitrust injury was established as a matter of

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[4] By way of illustration, SI would note that other "issues of law" which are clearly fact issues for the jury were listed in the Pre-Trial Order (signed by McQuillan's counsel), including:

A. Did any defendant violate section 2 of the Sherman Act, 15 U.S. Code, by monopolizing, attempting to monopolize, or conspiring to monopolize the market for sorbothane products?

B. Did any defendant have monopoly power in the relevant market?

C. Did any defendant have the specific intent to control prices or destroy competition in the relevant market?

law.[5] But if that had been true, the trial court would have instructed the jury to that effect. In fact, there was no finding made on the existence of antitrust injury, and SI's request for an instruction requiring that the jury find antitrust injury as a predicate for liability was denied without explanation (or, indeed, contrary argument by McQuillan).

Third, McQuillan is not candid with this Court by suggesting that SI's Petition only "claims" to have requested a jury instruction on antitrust injury, and chides SI for not quoting a hard proposed instruction as a predicate for the grounds for the Petition. In fact, an explicit request was made by SI, and rejected by the trial court, that the antitrust injury element be included in the jury instructions as a necessary element of McQuillan's proof.[6]

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[5] As an aside, it should be noted that the attempt to demonstrate the alleged existence of antitrust injury as a matter of law by discussing the resale price fixing claim is misleading and unfair. This McQuillan claim was not reached or reviewed by the Ninth Circuit and is not, therefore, in issue on this Petition.

[6] On the Section One claim, SI requested that the trial court add "as a fourth element, there has to be an antitrust injury." On the monopolization claim, SI again requested the addition of "an initial element that requires that it be an antitrust injury she suffered." Similarly, for the attempt to monopolize claim, SI again requested that the trial court "add as a sixth element antitrust injury."

CONCLUSION

For the foregoing reasons, and those presented in the Petition, SI respectfully requests that the Supreme Court issue a Writ of Certiorari to the Ninth Circuit to rectify the clear errors made by that Court on the questions presented.

Respectfully submitted,

JOHN F. BOMSTER*
JOHN A. TARANTINO
W. JAMES MCKAY
ADLER POLLOCK & SHEEHAN
INCORPORATED
2300 Hospital Trust Tower
Providence, Rhode Island
(401) 274-7200
Counsel for Petitioners

*Counsel of Record